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No. 95-95

In the
Supreme Court of the United States
October Term, 1995

Unisys Corporation, doing business as Remington Rand Univac, doing business as Sperry Univac, doing business as Sperry, doing business as Unisys, doing business as Paramax Systems,

Petitioner,

vs.

Richard Anderson; Robert Eggan; Carl Englehorn; Norris Nielsen; Timothy Wandersee; Donald Woods; Peter Lowry,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT

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No. 95-281

SUPREME COURT OF THE UNITED STATES

Unisys Corporation, doing business as Remington Rand Univac, doing business as Sperry Univac, doing business as Sperry, doing business as Unisys, doing business as Paramax Systems,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEALS AS TO WHETHER AN ACCURATE BUT INCOMPLETE COMMUNICATION FROM A GOVERNMENT OFFICIAL MAY EQUITABLY TOLL THE ADEA CHARGE-FILING DEADLINE.

Respondents concede that the Eighth Circuit Court of Appeals unambiguously held in this case that an accurate, but incomplete, communication from a government official may justify equitable tolling of the ADEA's charge filing deadline. A-14-16. Respondents argue that the Eighth Circuit's holding (and the Eighth Circuit's previous holding in *Warren v. Department of the Army*, 867 F.2d 1156, 1160-61 (8th Cir. 1989)) is consistent with the decisions of the Second, Third, Fifth and Tenth Circuit Courts of Appeals. Respondents' claim is incorrect: a genuine conflict exists, which this Court can and should resolve granting Unisys' writ of certiorari.

Respondents argue that the Second Circuit Court of Appeals' decisions are in accordance with the Eighth Circuit Court of Appeals' decision in this case. However, Respondents omit any discussion of *Vernon v. Cassadaga Valley Central School District*, 1995 U.S. App. LEXIS 4714 *14-15 (2nd Cir.), in which the Second Circuit rejected the plaintiffs' equitable tolling argument. The Court held that, although an EEOC right to sue letter sent to the plaintiffs was "not a model of clarity," it "was clearer than that sent in *Long*, was correct in its content, and surely did not amount to affirmative misconduct." 1995 U.S. App. LEXIS at * 15. Respondents instead focus on the Second Circuit's previous

decision to reject equitable tolling in *Long v. Frank*, 22 F.3d 54, 58-59 (2nd Cir. 1994). Respondents argue that *Long* is inapposite because "*it was not misleading* because the EEOC's uncertainty stemmed from inconsistent case law." (italics in original). Respondents are correct as to the source of this inconsistency, but miss the point: the EEOC's letter was accurate, but still could mislead a party to act improperly. In this case, the MDHR's letter was also accurate (it contained the correct statute of limitations for the state statute) but could, arguably, mislead a party to act improperly by assuming the federal statute was identical to the state statute. The Eighth Circuit has accepted precisely the type of tolling rejected by the Second Circuit in *Vernon* and *Long*.

Respondents similarly ignore the direct conflict between the Eighth Circuit Court of Appeals' decision in this case and the decision of the Third Circuit Court of Appeals in *Williams v. Army and Air Force Exchange Service*, 830 F.2d 27, 30-31 (3rd Cir. 1987) that a government official's provision of incomplete information is insufficient to justify tolling. Respondents instead focus on the Third Circuit Court of Appeals' decision in *Kocian v. Getty Refining & Marketing Co.*, 707 F.2d 748, 754 (3rd Cir.), *cert. denied*, 464 U.S. 852 (1983). Respondents argue that "the key fact [in *Kocian*] was that the allegedly misled claimant had retained an attorney." The Third Circuit later held in *Williams*, however, that precisely the same conclusion is appropriate even if the claimant has not retained counsel. This decision is in direct conflict with that of the Eighth Circuit Court of Appeals in this case.

Respondents also ignore the conflict between the decision of the Tenth Circuit Courts of Appeals in *Mascheroni v. Board of Regents of the University of California*, 28 F.3d 1554, 1562 (10th Cir. 1994) that "the time limits in Title VII "will be tolled *only* if there has been 'active deception' of the claimant regarding procedural prerequisites." (emphasis in original) (citation omitted). The Tenth Circuit concluded that the plaintiff failed to demonstrate the requisite active deception necessary to establish equitable tolling.

Respondents correctly note that the Fifth Circuit Court of Appeals' decision in *Conaway v. Control Data Corp.*, 955 F.2d 358 (5th Cir. 1992) was based in part on the fact that the communications at issue were oral. *Conaway* remains the only law in the Fifth Circuit on this issue. *Conaway*, at a minimum, is in tension with the Eighth Circuit Court of Appeals' decision in this case. This "distinction" is illusory. Respondents had previously argued, in support of their shifting claims of equitable tolling, that tolling was appropriate because Stephen Cooper, the Commissioner of the MDHR, had assured Respondent Anderson that he had one year to file a claim of discrimination.

Finally, as discussed in detail in Unisys' initial Brief in support of its petition, the conflict between these positions is particularly important because it will impact upon a tremendous number of lawsuits. The MDHR (and many other federal and state agencies in Minnesota and elsewhere) send out thousands of such letters to potential charging parties, all of whom now may alter the charge-filing deadline under the ADEA and other federal statutes. The potential for abuse under such circumstances is substantial and will have

the effect of making the ADEA statute of limitations a nullity, at the mercy of every state and local agency.

II. THIS COURT SHOULD SETTLE THE ISSUE OF WHETHER A REPRESENTATION OF A STATE OFFICIAL CAN TOLL THE FEDERAL ADEA CHARGE-FILING DEADLINE DESPITE THE EMPLOYER'S COMPLIANCE WITH FEDERALLY IMPOSED NOTICE PROVISIONS.

Respondents note that the MDHR is "in effect acting as the EEOC's representative," a fact which they claim somehow alleviates the threat to the ADEA and other federal statutes posed by the Eighth Circuit Court of Appeals' decision in this case. As is discussed in Unisys's initial Brief in support of its petition (and ignored by Respondents), the fact that the MDHR is the EEOC's agent does not alleviate these problems. The EEOC cannot itself alter the ADEA's statute of limitations, and certainly cannot delegate "authority" to make such alterations to a state agency such as the MDHR. Moreover, the fact that the EEOC and the MDHR have negotiated a worksharing agreement does not prevent the ADEA and other federal civil rights statutes from being subject to the "vagaries of diverse state limitations statutes" previously condemned by this Court in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 762-63, 99 S. Ct. 2066, 60 L. Ed.2d 609, 619-20 (1979) and *Occidental Life Ins. Co v. EEOC*, 432 U.S. 355, 371, 53 L. Ed.2d 402, 97 S. Ct. 2447 (1977). Finally, the worksharing agreement will not lessen or limit the impact of this decision; such worksharing agreements have been negotiated by the EEOC and a state agency in nearly every state. This decision may therefore have an impact in a wide variety of different states.

The Eighth Circuit Court of Appeals' decision allows a state official to alter a federal statute of limitations by sending a form letter to prospective plaintiffs that accurately discusses charge-filing requirements under state law, but does not also discuss the federal requirements. This decision allows negligent or incomplete form action by a state official to nullify the effect of federal statutes of limitations. As discussed in Unisys's initial Brief, Congress sought to avoid this sort of interference, and this Court condemned such interference in *Oscar Mayer* and *Occidental Life*. The Eighth Circuit's decision in this case poses grave dangers to the integrity of the statute of limitations of the ADEA in particular and federal civil rights statutes in general.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted this 20th day of September, 1995.

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